

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FOR ONLINE PUBLICATION ONLY

----- X
:
RENALDO GARCIA :
:
:
Petitioner, :
:
- against - :
:
UNITED STATES OF AMERICA, :
:
:
Respondent. :
----- X

MEMORANDUM
AND ORDER
09-CV-4104 (JG)

JOHN GLEESON, United States District Judge:

Renaldo Garcia filed a motion to vacate his sentence under 28 U.S.C. § 2255 on September 11, 2009. I heard oral argument on February 19, 2010, and denied the petition orally after the argument. The minute entry for the proceedings filed on the docket stated incorrectly that a decision would be filed separately. On February 23, 2010, Garcia appealed my denial of his petition to the United States Court of Appeals for the Second Circuit. On February 24, 2010, Garcia moved for a certificate of appealability, as required by 28 U.S.C. § 2253. Finding there had been no substantial showing of a denial of a constitutional right, I denied Garcia's motion on February 24, 2010.

On March 15, 2010, Garcia filed an application with the Second Circuit for leave to file a successive motion for relief under 28 U.S.C. § 2255. On April 13, 2010, the Second Circuit issued a mandate denying Garcia's application because his habeas petition was not final as of the date of his application. *See Whab v. United States*, 408 F.3d 116, 118-19 (2d Cir. 2005). The Court transferred the motion to me for "whatever further action the district court finds appropriate."

Upon review of Garcia's application, I deem the claim raised by Garcia to be a new one. Garcia argues that the government failed to prove the type and quantity of drug involved in his offense beyond a reasonable doubt, as required by *Apprendi v. New Jersey*, 530 U.S. 466 (2000), before Garcia could lawfully be given a sentence in excess of 20 years. The rule announced in *Apprendi*, however, does not apply retroactively to § 2255 motions. *Coleman v. United States*, 329 F.3d 77, 90 (2d Cir. 2003). Accordingly, Garcia's claim is without merit and his petition, as supplemented, is dismissed.

So Ordered.

John Gleeson, U.S.D.J.

Date: July 29, 2010
Brooklyn, New York